



Witness Testing & Preparation: Tips on Maximizing Witness Credibility

by Richard Sheehy, J.D., Ph.D.
Jessica Evans, J.D., M.A.

The credibility of your witnesses with jurors will play a key role in whether their testimony is heard and given proper consideration in deliberations. Witness credibility is something that can be worked on and improved, primarily by pointing out to the witness how they present themselves and come across to objective third parties. **Ultimately, the more awareness a witness has regarding his or her presentation style and nonverbal cues, the better the chance that the witness will exhibit the qualities of expertness, attractiveness, and trustworthiness.** This will increase the likelihood that the witness will come across as credible and likeable to the jury, bolstering your case and your client's chance of winning. The following tips have been formulated based upon our witness testing and preparation practice and our experience in assisting clients in their trial preparations:

Issues in Presentation Style

The main factor in working with a witness' presentation style, is the witness' nonverbal behaviors. Nonverbal behaviors are cues that most people use, rightly or wrongly, to interpret the real meaning of what someone is saying. **Thus, a witness' nonverbal behavior will be used by jurors as a way of determining many of the characteristics discussed above:** jurors will watch the nonverbals to assess whether the person is being genuine and authentic (e.g., someone who testifies that they are absolutely sure about a given fact but consistently wrings their hands as they discuss it), and whether they are demonstrating emotional congruence with the content of their testimony (e.g., someone who is testifying about a highly emotionally charged issue yet describes it very matter-of-factly and nonchalantly). Nonverbal behavior can indicate to a juror that a witness is being defensive, evasive, dishonest, or that they are nervous, scared, arrogant, engaged in a power struggle, etc. The following non-verbal behaviors are ones that should be focused on in prepping a witness:

- **Eye-Contact**

The witness should maintain steady eye-contact with the attorney during the questioning period. It is okay to break eye-contact and look away while thinking of the answer to the questions. When giving the answer, the witness should again establish solid eye-contact. This will ensure that jurors see the witness as being interested in the process and will also indicate to jurors that the answer was well thought out. Jurors will also take away that the witness believes in her answer because she is willing to look the questioner in the eye when answering

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and is not scared or intimidated. A lack of eye-contact at this stage could be interpreted by jurors as evasiveness, defensiveness, lack of confidence, and even dishonesty. On the flip side, the witness should be aware that too much eye-contact (i.e., prolonged, intense eye-contact without a break) could be interpreted as confrontational and aggressive behavior towards the questioner and could be interpreted as a negative trait for the witness.

- **Pausing**

The witness should be made aware of the best use of pauses. Most people are uncomfortable with silence and will quickly jump in to fill silences when they can. This could work against a witness. The witness who succumbs to this pressure to break the silence runs the risk of giving a poorly thought out answer and this is always dangerous when testifying. The witness should be instructed that it is perfectly okay and in fact, it is advisable, for them to think about the question for a time before answering. The downside to this is that too long a pause, particularly after a relatively benign or easy-to-answer question, could be interpreted as the witness trying to figure out how to avoid answering the question. Too much pausing could indicate evasiveness or defensiveness. The ideal use of pauses would be for the witness to take as much time as needed to review the question, formulate an answer in his or her mind, and then give the answer. Long pauses should be used judiciously – too many and they will lose their desired effect (i.e., that I am really thinking hard about your question and really want to answer it but I need some time to do that).

- **Behaviors Reflecting "I don't recall"**

While it is perfectly legitimate for a witness to say "I don't recall" in response to a question, it must be said with conviction and confidence and not in an apologetic manner. The tone the witness should take is one that suggests he or she has honestly tried to recall and has worked hard to recall, but ultimately, does not remember the specific facts that are the subject of the question. This will come across to jurors as genuine and sincere. The witness should also avoid any showing of attitude when answering "I don't recall."

- **Voice Tone**

The witness' tone of voice also plays an important role in jurors' assessment of credibility. A flat, monotone voice quality will bore jurors and lead them to ignore much of what the witness is saying. This could be devastating to the credibility of a witness. Thus, witnesses should be prepped to change the tone of their voice throughout their testimony. Of course, it should be appropriate for the situation and must be genuine and natural for the person. Many witnesses have some form of stage fright and tend to forget how they normally talk and adopt a more serious sounding, unemotional tone when testifying. Again, this is typically a very unconscious process and is usually easily remedied once it is pointed out to the witness and practiced.

- **Posture/Attire**

Similar to what happens with voice tone, many witnesses will adopt a very formal, rigid posture when testifying. Many times this is due to the setting – the witness is in a formal, legal setting (courtroom, lawyer’s office) and believes, erroneously, that he or she must act overly formal in return. The ideal posture to adopt is one that is comfortable and natural for the witness. Obviously, some level of formality is required but it should not trump what is natural for the witness. Ideally, you want the witness’ personality to come through during the testimony. If a witness generally uses his or her hands when she speaks, she should probably use her hands when speaking during her testimony. To do otherwise would run the risk of coming across as disingenuous and insincere and jurors tend to pick up on these subtleties, even if the lawyers do not. The idea is for the witness to adopt a posture that does not look staged and does not look artificial. A staged, artificial posture only increases the risk of jurors seeing the witness as rehearsed, artificial, and fake.

The same applies to attire. Again, a certain level of formality is required to show respect for the process. However, you want jurors focusing on the witness, not their clothing. Attire should be professional but unobtrusive and neutral. Don’t put someone who never wears a suit and tie in a suit and tie because chances are they will not feel comfortable or natural and this will come through during their testimony.

- **Coaching the Witness**

The most valuable tool in helping to coach a witness and prepare him or her to testify is to utilize videotape review. Watching oneself on video could very well be one of the most intimidating experiences imaginable. However, the benefits far outweigh this feeling of discomfort. The beauty of videotape is that it does not lie. A witness cannot blame the attorneys for being “mean” or unreasonable because their undesirable behaviors are right there on the screen. It also serves to raise the witness’ awareness of behaviors and traits that they are blind to, such as the little smirk on their face after every “I don’t recall,” the way they look away during difficult questions, the way they wring their hands and shift in their seat when trying to avoid answering a question, and so on. When preparing a witness for video deposition, one needs to think of this as live testimony since the tape will potentially be played before the jury. Items to consider when preparing video depositions: instruct witness to look directly into the camera since that will be like looking at the jury; proper lighting and a professional backdrop should be provided; and superior audio quality must be maintained.

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